United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1001

To be argued by
JOHN L. POLLOK

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1001

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P/75

UNITED STATES OF AMERICA,

Appellee,

—v.—

SALVATORE LARCA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT, SALVATORE LARCA

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BRIEF FOR THE APPELLANT, SALVATORE LARCA

Statement of the Issues Presented for Review

1. Did the court below err by admitting testimony and a tape recorded conversation which painted the defendant as a member of organized crime?

2. Did the court below err in excluding hospital records kept in the ordinary course of business where there was no sworn testimony showing those records to be untrustworthy and the records otherwise complied with Rule 803(6) of the Federal Rules of Evidence?

3. Did the court below unduly restrict the cross-examination of the prosecution's chief witness by refusing to allow that witness to be impeached by certain prior criminal convictions?

4. Did the court below err in excluding testimony offered by the defendant Larca which testimony demon-

strated the defendant's lack of intent to commit the crime?

5. Did the court below err in permitting the prosecution to read portions of a witness's grand jury testimony in evidence without the presence of the witness despite the fact that he was available to the government?

6. Did the court below err in allowing the prosecution to introduce evidence of prior crimes purportedly committed by the defendant which crimes pre-dated the conspiracy alleged in the indictment by over four years?

Statement of the Case*

This is an appeal from the final judgment of the United States District Court for the Southern District of New York (Carter, *J.*) entered on December 21, 1976, after a jury trial, convicting the defendant-appellant Salvatore Larca, (hereinafter the defendant) and two others of conspiring to import, distribute and possess with intent to distribute narcotics in violation of Sections 812, 841 (a)(1), 841(b)(1)(A), 846 and 952 of Title 21 United States Code. The defendant was also charged with the substantive offense of possession with intent to distribute narcotics in violation of 21 United States Code Sections 812, 841(a)(1), and 841(b)(1)(A) (A. 8-13).

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* The reproduced joint appendix herein is cited, *infra*, using the prefix "A". References to the trial transcript which have not been reproduced in the joint appendix bear the prefix "R." Government exhibits are referred to as "GX" and defense exhibits as "DX".

More particularly, the indictment charged that from on or about May 1, 1976 up to August 20, 1976, the defendant Larca, together with four other defendants and four unindicted co-conspirators, willfully, knowingly and unlawfully conspired to violate the narcotics laws of the United States by unlawfully, intentionally and knowingly importing into the United States a quantity of heroin.

Count 2 charged the defendant and two others with the unlawful possession, with intent to distribute 32.4 grams of heroin on August 20, 1976.

The defendant was sentenced to serve concurrent terms of 15 years on each count and given 3 years special parole.* (A. 316-317). The District Court refused to stay execution of the sentence pending appeal.

Statement of Facts

1. Introduction

On August 17, 1976, Gene Travers was arrested by the United States Customs Service at Honolulu, Hawaii, when he tried to smuggle approximately seven pounds of heroin into the United States from Thailand (R. 677, 732-735; GX 54 a-i). Through Travers' cooperation, agents of the Drug Enforcement Administration apprehended Joseph Boriello, the central operative in the conspiracy alleged herein and the linch-pin of the prosecution's case against the defendant.

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* Matthew Madonna also known as Paul deRobertis, (hereinafter referred to as Madonna), received a sentence of 30 years and was fined $50,000. Richard Klinger (hereinafter referred to as Klinger) was sentenced to imprisonment for 6 months. Joseph Boriello and Joseph Florio pleaded guilty prior to trial and testified for the government.

Relying primarily on the testimony of Boriello, who was arrested on August 20, 1976 and who became a government informer soon thereafter, the following story emerged:

2. The Prosecution's Case

a. Joseph Boriello Makes A Connection In Thailand

In April 1976, Boriello, a thrice convicted felon and narcotics addict, using a forged passport, traveled to Bangkok, Thailand using money he had previously borrowed from the defendant Larca (R. 104, 105, 109, 243-244).* In Bangkok, Boriello met a part-time law student and bell-hop named Lee Chai who, according to Boriello, supplied him with a quantity of heroin (R. 110-111).** The contraband was smuggled into the United States strapped to Boriello's waist the first week of May, 1976 (R. 112).

Soon after his return to New York, Boriello met with his half-brother, Ralph Battista, and the defendant, Larca (R. 116). Boriello maintained that during the course

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* Boriello's convictions include robbery, possession of narcotics and conspiracy to possess with intent to distribute heroin. Although Boriello's record included several other criminal convictions, cross-examination as to those offenses was, we believe, erroneously precluded by the Court (202-209). See *infra*, Point III(b) at pp. 34-36.

** As is here indicated, the touchstone of Boriello's narrative was his April trip to Bangkok. It was conceded that the defendant Larca had nothing to do with this trip (243). The defense in its case attempted to demonstrate, through the business records of an accredited hospital, that Boriello did no traveling in April. The Court, however, struck these records just prior to the defense summations (A. 313). This, we believe was reversible error. See Point II, *infra* at p. ....

of this meeting, he informed the defendant that he had "run across some goods" in Thailand which were readily available in large quantities and would cost $7,500 per kilogram. Boriello asked Battista and the defendant Larca to chemically test a sample of his wares (R. 116-117).* Several days later Battista reported that the samples furnished by his half-brother were almost pure (R. 118). Boriello then suggested to the defendant that for $15,000 or $20,000, he could import a kilogram of heroin (R. 119). Boriello's plan, which was later implemented, called for financing by the defendant and the use of a woman acting as a courier (R 120). On June 1, following the recruitment of his courier, Boriello and a woman identified only as "Aurora", flew separately to Bangkok via Amsterdam (R. 122-126).

Following the couple's arrival in Thailand, Boriello obtained and packaged one kilogram of heroin, strapped it to his courier's body, and then returned to Los Angeles via Tokyo and Hawaii (R. 126-127).

After landing in Los Angeles, he took possession of the drugs and flew directly to New York, where he delivered them to the defendant Larca (R. 128-134; GZ 2, 3, 4).

Approximately one week later Boriello received $9,000 from Larca and the two discussed further trips to the Far East (R. 135-136). According to Boriello he agreed to recruit couriers and Larca agreed to furnish special false bottomed suitcases, which would be used to transport the contraband.

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* Battista, though named as a co-conspirator, was not indicted pursuant to an informal grant of immunity given in return for Boriello's testimony. Battista did, however, testify for the defense, as did his brother Kenneth Battista. Both contradicted critical portions of Boriello's narrative. See for example (R. 1358-1360).

b. Boriello Prepares to Return to Thailand

On or about July 5, Boriello and his paramour, Leslie Laub flew to San Francisco to attempt to recruit couriers for his planned trip to Bangkok.* Immediately on his arrival in California, Boriello telephoned Joseph Florio, an old friend he had known from their participation in "Synanon" (R. 140, 592).** Pursuant to that telephone call, Boriello and his girlfriend met Florio the following afternoon (R. 140, 592). Although Florio refused Boriello's offer to act as a courier, he did suggest a woman named Rhonda who might be interested (R. 141, 594-595). After meeting Boriello, she was indeed receptive and he gave her $500 as an advance (R. 143). The following day she changed her mind and so Boriello returned to Florio for further assistance (R. 143).*** Florio gave Boriello the name of one Gene Travers, a resident of the Bronx, who agreed to participate in the venture (R. 144, 595, 682).

After leaving the San Francisco area, Boriello and Mrs. Laub traveled to Orange County, California to visit

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* Over objection, the Government was permitted to introduce the records of the Regency Hyatt House in San Francisco (GX 18) to corroborate Boriello's testimony that he had stayed at that hotel while in San Francisco. The records were admitted despite the fact that no foundation was laid (R. 138-139). See sec. 803(6) of the Federal Rules of Evidence. While the ruling of the Court, standing alone is probably harmless error, we argue *infra* at Point III that it was part of a pattern of bias by the Court which effectively denied the defendant a fair trial.

** Florio, an ex-addict and convicted felon, had participated with Boriello in Synanon's drug treatment program in the late sixties. In the instant case, he pleaded guilty to conspiracy, and cooperated. See GX 3512(b).

*** Boriello asked Florio to get his $500 back. Florio agreed, and subsequently sent Boriello a check for $500 (GX 19; R. 597-598). See also R. 415-419.

Richard and Linda Klinger, friends of Mrs. Laub, and in further quest of couriers (R. 145). During the course of their stay with the Klingers, Boriello importuned Richard Klinger to either participate in Boriello's scheme as a courier or provide the name of one who would (R. 145-148). Klinger suggested Jan Portman, an old friend of his from Florida, and after several phone conversations, she agreed (R. 146, 447-450).*

His recruiting trip a success, Boriello and Mrs. Laub returned to New York via Las Vegas (R. 150). Shortly after his arrival in New York City, Boriello met with the defendant Larca, informed him that two couriers had been recruited and asked when the suitcases would be ready. According to Boriello, the defendant stated the suitcases would be ready as soon as Boriello was ready (R. 150-151). Boriello spent the next several days meeting with and instructing Travers in New York and Portman in Florida as to their duties and responsibilities (R. 151-154, 451-454, 682-684).**

During the course of these preparations, Larca asked Boriello to arrange to meet Travers at a luncheonette in the Bronx so that he could observe and presumably approve Boriello's choice. Boriello agreed, and the observation took place the following day. (R. 155-159, 687-691, GX 26).*** Following this staged observation, Travers

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* According to Boriello, both Florio and Klinger were promised commissions for their referrals. (See e.g. R. 145, 149). In fact neither was given any consideration.

** Travers was instructed to obtain a passport and to arrange a trip around the world for himself and possibly two women (R. 683-684). Similarly, Portman was told to obtain a passport, book a trip to the Far East travel to the Sheraton Hotel in New York City and await further contact (R. 454-456).

*** Although Travers was able to recall the scene at the Luncheonette in detail, no attempt was made to have him identify the defendant as one of the persons present (R. 687-690).

and Boriello went to Boriello's home in Riverdale where Travers received $5,000 or $6,000, four false-bottom suitcases, and instructions for contacting Boriello in Thailand (R. 162-165, 691-693; GX 11-14). Finally Boriello gave Travers one-half of a twenty dollar bill stating that if anything happened to him "his people would have the other half of the twenty." (R. 694; GX 31).* The two then arranged to meet in Bangkok the week of August 10, 1976 (R. 692). The following day, Travers began his sojourn to the Orient via Amsterdam, Brussels, Munich and Paris (R. 696).

Shortly after Travers departure, Boriello met Portman at the Sheraton Hotel, where he gave her two false-bottom suitcases, $6,000 and told her to be in Bangkok on August 11, 1976 (R. 168-169, 460-462; GX 13, 14). Following her instructions, Portman left New York on July 28 and flew to Thailand via Tokyo, Hong Kong and Indonesia. She arrived in Bangkok on August 12, 1976. (R. 463).

Immediately following Portman's departure from New York, Boriello, his paramour, and her daughter left New York for London (R. 173). From London they traveled to Thailand via Paris, Marseilles, St. Tropez, Nice and India (R. 174) Boriello and his small entourage arrived in Bangkok on August 11, 1976.

c. The Bangkok Connection

Following his arrival in Bangkok, Boriello contacted Lee Chai, his source; made arrangements for the purchase of 10 kilos of heroin for $65,000 and contacted his

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* A similar procedure was used by Boriello in dealing with Jan Portman (R. 184, 472).

fellow traveler Gene Travers, to whom he delivered the contraband for packaging. (R. 176-177, 697).*

Boriello's plans, however, began to go awry almost immediately. To the chagrin of Boriello and Travers, the contraband would not fit into the alotted space in Travers' two suitcases. Boriello thus instructed Travers to pack what he could and save the balance for Jan Portman, Boriello's second courier (R. 178).** Portman arrived in Bangkok later than expected, and Boriello was not able to properly integrate her into his plans (R. 180, 699). Consequently, on August 16, the day that his visa expired, Boriello left Bangkok with Travers in charge of completing the packing and coordinating his and Portman's return trip (R. 466-472). Boriello did, however, give his two couriers instructions on how to proceed once they had reentered the United States. He told Travers to return to New York and wait at his apartment. Portman was instructed to check into the New York Sheraton and wait to be contacted (R. 184).

On the day following Boriello's departure, Travers and Portman finished packing the contraband into their false-bottom suitcases and made preparations for their departure. On August 17, 1976 Portman and Travers left Bangkok for the United States. Travers was to fly directly to Hawaii while Portman would return via Tokyo (R. 476, 701).***

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* According to Boriello he had left New York with $88,000—the proceeds of the sale of the contraband he had smuggled during his June trip to Thailand (R. 176-177).

** As it turned out, Boriello was compelled to return a quantity of heroin to Chai for safe keeping (R. 180-181, 700; GX 9).

*** The money for their return trip was furnished by Boriello just before he left Bangkok (R. 701).

d. The Plot is Uncovered and a "Controlled Delivery" is Arranged

On August 17, 1976, Travers arrived in Honolulu. As he went through customs, his suitcases were seized and his contraband discovered. He was then arrested and agreed to cooperate with agents of the DEA by making a controlled delivery in New York (R. 702, 732-733).* Agents of the DEA then removed all but a small part of the contraband and re-packed Travers' four suitcases with flour and sugar (735). The following day, Travers accompanied by several agents flew from Hawaii to New York where they were met by Agents Paige and Kobell of the New York office (R. 735-739). After an interview at DEA headquarters, Travers and the agents went to Travers' apartment to wait for Boriello.

Similarly, when Portman arrived in Honolulu on August 18 she too was arrested, agreed to cooperate and make a controlled delivery (R. 477-478, 565-570, 576-578). As a result, she accompanied by Agents of the DEA, flew to New York, checked into the Sheraton and awaited contact. None was forthcoming. She, therefore, placed a call to Richard Klinger in California with the avowed purpose of getting information which would be helpful in locating the ultimate receivers of the contraband she had been carrying (R. 478-479).**

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* Both the field tests and chemical analysis of the contraband established it to be almost pure heroin (R. 733, 740-743).

** Despite strenuous objection, the Court permitted the jury to hear an *unredacted* tape recording of the call (GX 52-52a). It is the defendant's position that this Portman-Klinger conversation contained matter which was so prejudicial that it deprived the defendant Larca of a fair trial. (See Point I, *infra* at pp. 17-22. The full content of the tape may be found at pp. A. 285-294 of the defendant's appendix.

e. The Events of August 20, 1976

The DEA's trap was now baited and set. Portman was safely ensconced at the Sheraton Hotel, Travers waited at his apartment and the surveillance teams were ready. It remained only for the bait to be taken and the trap to be snapped shut. The government did not have to wait long. Immediately on his return to New York on August 20, Boriello called Travers at home and told him he would be in touch later that day (R. 186-187, 703; GX 50-50a).* Boriello followed by Special Agent White then traveled to the home of the defendant Larca (R. 211, 799-781, GX 17).

According to Boriello, Larca asked how the trip had gone. Boriello replied "o.k." and then handed Larca what appeared to be a business envelope (R. 782). Boriello then left Larca's home, failed in an attempt to reach Portman, and returned to the Larca residence (R. 218). At approximately 3 p.m., the defendants Larca and Madonna came into the room in which Boriello was having coffee. Boriello asked Madonna if he remembered him, and Madonna said, "I'm sorry, I don't." Madonna then left (R. 219).**

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* When one juxtaposes the testimony of Boriello, Travers, and Portman, a series of discrepancies as to dates and times emerges. Thus, for example, Boriello here testified he returned to New York on August 20, (R. 184) and told Travers he would see him later that evening (R. 187). Travers on the other hand testified that Boriello called him on August 19 and made arrangements to see him the following day (R. 703). It is, however, clear that the conspiracy alleged here terminated on August 20. Consequently, we have here adopted those facts which most easily fit that time table. c.f. Boriello's admission on cross-examination that he was "really loaded" on narcotics on August 20 and does not remember most of the events of that day (R. 240).

** Interestingly, although several agents had Larca's home under surveillance, none was able to attest to Madonna's presence there on August 20.

Approximately one hour after Madonna's departure, the defendants Larca and Boriello drove to Bronx Park East where the red Ford Granada was parked (219).* According to Boriello, Larca instructed him to get in the red Ford, check its registration, and to be sure to be at 58th Street and Fifth Avenue by 5 p.m., where he would be awaiting (R. 219-220). Boriello then drove the red Ford to the vicinity of Travers' apartment. En route, he called Travers and told him to have the suitcases ready and waiting when he drove up and honked the car horn (R. 221). When Boriello arrived at Travers' residence there was no response to their pre-arranged signal, so he went into the apartment and assist in getting the suitcases downstairs and into the car (222).** As Travers and Boriello were loading the contraband into the red Ford, Boriello was arrested in possession of the drugs and a large sum of money (R. 223-224, 882; GX 8, 8a-8c). Apparently, within minutes, he agreed to cooperate and was taken to the corner of Fifth Avenue and 85th Street; debriefed and ordered to proceed with his

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* It was the Government's position at trial that the red Ford was rented by the defendant Madonna using the fictitious name Paul DeRobertis specifically for this narcotic transaction. Madonna conceded he had rented the red Ford under a pseudonym, but maintained that it was for a wholly innocent purpose. Despite Madonna's concession, the prosecution went to great lengths to prove that Madonna had rented the Ford at a time when he already had rented another vehicle (see e.g. the testimony of Lorrie Kurish R. 772 et sec., the testimony of Agent Toale R. 661 et sec., and the testimony of Lila La Grasse, an employee of the Hertz Corporation, who testified that the red Ford was leased to Paul deRobertis at 3:40 p.m. on August 19, 1976 (R. 648-655)).

** Boriello did not know that agents of the DEA were hiding in Travers' closet and that their conversations were being recorded (879-880; GX 51).

plan as if nothing had occurred (R. 882-883).* As requested, Boriello, followed by several agents of the DEA, drove the red Ford to 58th Street and Fifth Avenue (R. 224, 882). Once there, he parked a few cars from the corner of Fifth Avenue on the southside of the Street (R. 886). Within minutes the defendants Larca and Madonna emerged from a local restaurant (R. 228-886). Larca and Boriello then exchanged car keys, and Boriello was instructed by Larca to return to his home (228).** Madonna then entered the drivers side of the Ford, while Larca entered the passenger side. At the same time, Boriello attempted to enter a Cadillac convertible which was parked directly in front of the Ford (R. 886). All three defendants were then arrested; the Ford seized and later searched; and the bogus contraband recovered (R. 886, 889, 939-940, 961-962).

f. The Post-Arrest Conduct of Boriello and the Defendant

Following his arrest, the defendant Larca was taken by car to DEA headquarters. During the course of that ride, Larca, after being warned of his constitutional rights asked Agent DeGravio how the agents were able to follow

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*The following day Boriello revoked his offer to cooperate (R. 262), but again changed his mind on or about September 23, 1976. Boriello's chameleon like changes of posture became the subject of a rather bizarre pre-trial hearing, following which the Court suppressed certain exculpatory evidence given to defendants by Boriello because of purported improprieties committed by trial counsel.

**There is conflicting testimony between Boriello and the observing agents as to whether the exchange of keys was between Boriello and Larca or Boriello and Madonna. Compare Boriello's Testimony at 228 with Melia's testimony at R. 886. Other agents testified that no keys were exchanged.

him to 58th Street (R. 963). Boriello first was taken to his apartment which was searched and then to a motel where he, in the custody of the agents, awaited the dawn, and his arraignment (R. 228-229). Both in his apartment and later at the motel, Boriello injected himself with heroin (R. 228-233).*

Following the prosecution case, each of the defendants moved for a directed verdict of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure (R. 1213 et sec.). These motions were in all respects denied (R. 1233-34).

3. The Defense

(a) Introduction

Through the use of members of the Boriello and Larca families, the defense attempted to show that Boriello had lied in his factual narrative, in describing his relationship to the defendant Larca, and in his description of the events of August 20, 1976.**

(b) The Events Of August 20, 1976

On the morning of August 20, 1976 Boriello and Ken Battista one of his half-brothers spoke and agreed to

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* Although all of the agents involved in maintaining custody of Mr. Boriello denied any complicity or knowledge of Boriello's heroin use while in custody, it is difficult to believe that experienced Federal narcotics officers were unaware that their "prisoner" was shooting heroin (cf. R. 259, 270-271).

** All three defendants presented lengthy cases. No attempt, however, was here made to detail the evidence presented by Madonna or Klinger except as that evidence relates to the defendant Larca. In any event, much of defendant Larca's case was emasculated by very restrictive rulings by the Court. See *infra*, Points II and III at pp. 28-32, 36-37.

meet later that day at the defendant Larca's home to go swimming (R. 1372).* Ken Battista arrived at the Larca home at 12 noon and left at about 12:30. He returned at about 4 p.m. (R. 1317).

At approximately 2 p.m., Boriello arrived at the Larca home and was introduced to the defendant Larca and a number of people sitting around the pool by his second half-brother Ralph Battista (R. 1362-1363).

Ben Larca, the defendant's brother and constant visitor to the Larca home, met Boriello for the first time on August 20 (R. 1248-1251). On the afternoon of that day, he observed Boriello talking to the defendant Larca and Ralph Battista. Boriello told the defendant that he was sick, but could not go home inasmuch as he needed to borrow a car to take care of a few things (R. 1254-1255, 1368-1369). The defendant agreed to loan him the "rented car" turned over the keys, and they both left the house (R. 1259, 1369). The defendant returned in after a few minutes. Approximately one hour later at about 3 p.m., Ben Larca observed the defendant Madonna standing at the front gate shouting at his brother, (R. 1255).** Approximately 45 minutes later following

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* The Larca home contained an outside swimming pool, and it was the usual custom for friends and neighbors of the Larca family to use the pool whenever they desired. On August 20, 1976, there were several families using the pool (R. 1363).

** The Court refused to allow the substance of the conversation but did permit an offer of proof. In that offer, Ben Larca testified that Madonna said "how could you lend somebody I don't know my car." Madonna was irritated and upset (R. 1272-1273, 1370-1371). It is the defendant's position that the Court erred in excluding this testimony. See Point III, *infra*. Had the Court permitted the jury to hear the substance of this conversation it would have been free to infer that defendants believed the meeting on 5th Avenue and 58th Street was simply for the return of the car Boriello had borrowed.

Madonna's departure, the defendant Larca left his home after receiving a telephone call (R. 1289-1290, 1379).*

At about 9 p.m. on August 20, Ken Battista returned to the apartment he had been sharing with Boriello (R. 1331). Instead of finding his half-brother, Ken Battista found Boriello's paramour who was upset and made a request (R. 1331-1332).** As a result of that request he went to the home of Ralph Battista, had a conversation and then returned home.

(c) Boriello's Post Arrest Activities

Following Boriello's arrest, his two brothers (Ken and Ralph) along with their mother visited him several times at the Metropolitan Correctional Center (MCC) (R. 1335).*** During one visit, Boriello told his mother that he had been arrested on 58th Street and 5th Avenue in a borrowed car with the persons from whom he had borrowed the car. He informed his mother that the other persons were innocent and that he so told the agents who arrested him (R. 1462). He also told his mother that various agents of the DEA told him that if he did

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* The Court sustained the Government's objection as to what the defendant Larca said on the telephone (R. 1377).

** The Court did not permit the substance of these conversations.

*** Once again the Court refused to admit the substance of certain conversations between Boriello and his brother despite the fact that Boriello's statements were clearly against his penal interests. The defendant's offer of proof revealed that on one occasion Boriello asked his brothers to bring him drugs; that the defendant was innocent and that he, Boriello, was sorry he involved him but he no longer cared who he involved, only Leslie (his paramour) mattered (R. 1336-1338).

not implicate the defendant Larca, they would arrest his lover Leslie Laub (R. 1462-1481). On the family's last visit, Boriello threatened to involve both his brothers and mother in his own criminal acts (R. 1342-1343, 1386-1388, 1464-1465).

Finally, in an effort to demonstrate that Boriello had perjured himself with respect to his April trip to Thailand, the defense offered the records of the Methadone Clinic at the Albert Einstein Hospital where Boriello had been a patient. These records (DX V) (A. 313 et seq.) demonstrated beyond peradventure that Boriello was present at the clinic on a numbr of occasions during the month of April. However, after admitting this crucial evidence the Court reversed itself and struck the evidence.*

POINT I

The Court Erred By Admitting Testimony And A Tape Recorded Conservation Which Painted The Defendant As A Member Of Organized Crime.

a) Introduction

Perusal of the evidence reveals that the Government's case against the defendant Larca rested almost entirely on the testimony of Joseph Boriello, who painted Larca as his financier and most immediate superior in the alleged conspiracy. Following Boriello's narrative, Jan Portman, a courier who had been recruited by the defendant Klinger, testified as to her role in the criminal venture. Over the strenuous objection of the defense, Jan Portman was permitted to testify to the full sub-

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* See Point II, *infra* at p. 28.

stance of a telephone call made to the defendant Klinger following the termination of the conspiracy.*

In that conversation Portman told Klinger that she had just gotten back from her trip and that she had been delayed in Honolulu. She told Klinger that she thought that Boriello might be worried because of her delay and may have been trying to contact her since she had the "stuff" (A. 46). Klinger then gave Jan Portman Boriello's telephone number and suggested that she contact him directly. The conversation continued when Portman asked Klinger if he knew who any of Boriello's people were—"people that were buying, people that gave him the money to make the whole thing possible." Klinger replied that they were the type of people who he wouldn't really want to know—"They were heavies—heavy duty—very heavy duty people." Portman then reported that Klinger had said "let's just call him the 'godfather'" (A. 47-48).

The transcript of the telephone conversation was even more damning and prejudicial to the defendant Larca. In the middle of the conversation, the following exchange which is initiated by Portman occurs:

> Portman Uh huh . . . Okay so do you know . . . like the people he works with . . . are they really, you know, up there. The people, you know, I know . . .

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* The substance of the telephone call was contained in the direct examination of Jan Portman as well as in a tape recording made by the Agents with the consent of Miss Portman. The full transcript of that telephone conversation appears at pages A. 285-A. 294.

Klinger Heavy duties.

Portman They're real heavy duty.

Klinger Heavies.

Portman Real heavy duty. But you, do you know any of them personally? I mean, you know . . .

Klinger . . . chuckles . . .

Portman Are they . . . huh?

Klinger I, I don't know. Call him the Godfather.

Portman The Godfather, you call him, but that's about it?

Klinger Yeah.

Portman Huh. But they're pre . . . they're really heavy duty?

Klinger Yeah, I, I, you know, I . . .

Portman Mafiosa? I mean?

Klinger They're, they're the type of people, right. I wouldn't want to know too personally. You know what I mean? (A. 290).*

It is the defendant's position that the injection of the words "Godfather" and "Mafiosi" to describe the defendant through the direct and explicit testimony of a

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* The Government sought to introduce the full transcript to prove that the defendant Klinger had knowledge of the unlawful purposes of the alleged conspiracy. The defense did not object to the general conversation admitted, but sought to redact those portions of Portman's testimony and the telephone conversation which contained the highly prejudicial material. The Court refused to redact.

de facto Government agent so prejudiced the defendant as to deprive him of a fair trial.*

As we shall demonstrate below Rules 403 and 404 of the Federal Rules of Evidence alone and in connection with each other preclude precisely this type of unfair and insidious prejudicial matter from coming before a jury.

b) Rule 403 Of The Federal Rules Of Evidence Precluded The Admission Of The Prejudicial Manner Here In Issue.

Rule 403 states where pertinent:

> ". . . relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ."

Rule 403 thus adopts the traditional balancing test in which the Court must weigh the probative value of the evidence sought to be admitted against the capacity for prejudice which the evidence might engender. *United States* v. *Robinson*, — F.2d — (2d Cir. 1976; Slip. Op. p. 5913). Applying that test to Portman's characterizations, it is crystal clear that the prejudice quotient is extremely high while the probative value is almost nil. Thus despite the wide discretion vested in the trial Court,

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* Although Jan Portman's testimony and the telephone call did not directly name the defendant Larca as a "Godfather" or "Mafiosi", there is no question that the words were directed at the defendant Larca and were "contextually inculpatory." c.f. *United States* v. *Trudo*, 449 F.2d 649 (2d Cir., 1971). Portman's words taken together with Joseph Boriello's identification of Larca as his boss, thus had the inevitable effect of associating the defendant with Jan Portman's prejudicial characterization. cf. *Serio* v. *United States*, 401 F.2d 89 (D.C. Cir., 1968).

United States v. *Harvey*, 526 F.2d 529, 536 (2d Cir., 1975), the evidence herein should have been excluded.

The Advisory Committee's notes of Rule 403 define "unfair prejudice" as an "undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." See *McCormick on Evidence*, sec. 152 pp. 319-321. Thus, evidence that appeals to a jury's instinct to *punish*, triggers other mainsprings of human action or may cause a jury to base its decision on something other than the issues involved in the case, should be excluded. See *Weinstein's Evidence*, pp. 403-16. There can be no doubt that the use of the words "Godfather" and "Mafiosi" to describe a defendant are precisely that kind of matter which provoke a jury's instinct to punish. Although the media has sometimes characterized the "Mafia" as modern-day Robinhoods, it must be conceded that in today's argot any language which connects an individual to organized crime or the Mafia conjurs up notions of evil men dedicated to the commission of crime—men who should be punished at any cost. The "Mafia" or "Godfather" characterization thus lends itself to the "deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught . . ." 1 *Wigmore*, Sec. 57 at p. 456.

Several Courts of Appellate jurisdiction have assumed that characterizations of this sort are inherently prejudicial and must be excluded. In *United States* v. *Love*, 534 F.2d 87 (6th Cir., 1976) the defendant was convicted for the interstate transmission of communication containing a threat to injure another person. The Court of Appeals for the Sixth Circuit held that although there was sufficient evidence to convict, reversal was required because the prosecution had injected into the trial a

highly prejudicial suggestion that appellant was part of a widely publicized enterprise reputedly involved in organized crime.* See also *United States* v. *Perry*, 512 F.2d 805, 807 (6th Cir., 1975 suggestion that the defendant, was as a member of the "Dixie Mafia" held reversible error) and *Dexter* v. *State*, 20 Cr. L. 2307 (Texas Court of Criminal App., 12/22/76 use of file cabinet in Court room with words "Organized Crime" on side held reversible error). *United States* v. *Schwartz*, — F.2d — (2d Cir., 1/25/77 Slip Op. 1535) is not to the contrary. In that case, the defense opened the door by introducing into evidence a tape which was replete with statements and graphic terms which linked the defendant to sinister figures.

Unlike the case at bar, the prosecution's question in *Schwartz* which involved the word "Mafia" did not contain any unfounded allegation that the defendant was associated with organized crime. On the other hand, the reference used in the instant case clearly and directly tainted the defendant.

Moreover, in analogous situations involving highly charged public issues, this Court has reversed convictions despite cautionary instructions by the District Court. See *United States* v. *Turoff*, 291 F.2d 864, 868 (2d Cir., 1961—Communism); *United States* v. *Krulewitch*, 145 F.2d 76 (2d Cir., 1944); *Scales* v. *United States*, 367 U.S. 203, 256, 81 S. Ct. 1469, 1500 (1961—War atrocities); *United States* v. *Provoo*, 215 F.2d 536 (2d Cir., 1953 — homosexual behavior); and *United States* v. *Mullings*, 364 F.2d 173, 176 (2d Cir., 1966—narcotics Addiction).

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* The specific question was whether "the National Account System (defendant's employer) was part of another organization of ill-character like the mafia or anything like that."

c) The Portman-Klinger Characterizations Should Have Been Excluded Pursuant To Rule 404(a) Of The Federal Rules Of Evidence.

Assuming *arguendo* that this Court should find that Rule 403 is inapplicable to the Portman-Klinger characterizations, it is the defendant's position that those characterizations should have been excluded pursuant to Rule 404(a).

It is crystal clear that the disputed portions of the Portman testimony and tape recording were a direct assault on the character of the defendant. They thus violated the long recognized rule of *Michelson* v. *United States*, 335 U.S. 467, 69 S. Ct. 213 which has now been codified in Rule 404(a) of the Federal Rules of Evidence that the prosecution may not use evidence of a defendant's evil character or bad reputation to establish the probability of his guilt.*

As stated by Mr. Justice Jackson in his classic opinion in *Michelson*:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the de-

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* It is true that there are certain exceptions to this rule, but none apply here. c.f. *United States* v. *Webb*, 463 F.2d 1324 (5th Cir., 1972) and *United States* v. *Tropiano*, 418 F.2d 1069 (2d Cir., 1969), holding that in extortionate credit transaction cases and Hobbs Act cases, a defendant's bad reputation is admissible as bearing on the critical element of the victim's state of mind. See also, *United States* v. *Cunningham*, 529 F.2d 884 (6th Cir., 1976) holding that when entrapment is raised as a defense, prior criminal disposition may be sho[illegible]

> fendant with a presumption of good character, Greer v. United States, 245 U.S. 559, 38 S.Ct. 209, 62 L.Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. *The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.* The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The over-riding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. (Emphasis supplied)

In the case at bar, there can be no dispute that the Klinger-Portman tape referred to the character of the defendant Larca. Prior to the introduction of that tape, Boriello had testified that Larca was his financier and most immediate supervisor. Thus when Portman asked Klinger if he knew the people Boriello worked with, any further references must have *a fortori* have related to the defendant. See, "*Note Procedural Protections Of The Criminal Defendant—A Recent Evaluation Of The Privilege Against Self-Incrimination And The Rule Excluding Evidence Of Propensity To Commit Crime.* 78 Harv. L. Rev. 426, 1964. There is no question that the Portman-Klinger characterization was calculated to bring before the jury the bad reputation and ill-name of the defendant and thus should have been excluded. *United States* v.

Tomaillo, 249 F.2d 683, 690 (2d Cir., 1957); *United States* v. *James*, 208 F.2d 124 (2d Cir., 1953); and *Aldridge* v. *State*, 188 S.E. 2d 835 (GA App., 1972).

d) The Admission Of The Highly And Unduly Prejudicial Characterizations Were Not Harmless Error.

It is anticipated that appellee will urge that if the admission in evidence of the characterizations were error, their admission was harmless inasmuch as there was other substantial evidence to support the judgment. This position would be erroneous. In assessing whether the error of the admission of evidence concerning the characterization "Godfather" and "Mafia" was reversible, the critical question "is not whether there was substantial evidence to support the judgment, but whether the error affected the judgment." *United States* v. *Robinson*, *supra*, citing *Traynor*, *The Riddle Of Harmless Error* (1970). In any event the case at bar was not the characteristic "air-tight" narcotics prosecution. But for the testimony of the witness Joseph Boriello, there would be no case at all and Joseph Boriello's credibility was a critical question which had to be determined by the jury. Had the jury disbelieved Boriello, it would probably not have convicted the defendant. However the "Mafia"-"Godfather", characterization permitted the jury to convict Larca because he was a bad man even if they disbelieved Boriello.

This case is quite different from the situation in *United States* v. *Schwartz*, *supra*. In that case, the defendant, through one of its own witnesses, introduced a tape recording which painted the defendant as "connected with a lot of guineas" and "having under-world connections". Here the defendant had not placed his

character in issue nor did he "invite" the characterization. More importantly, the prosecution, continued to use the mafia myth. Not content with Portman's inflammatory remarks, the prosecution introduced the highly questionable testimony of Agent Tole. Tole who had the defendant Madonna under surveillance on August 19, 1976 (a date which has no relevance to the issues presented at trial), testified, at the direction of the prosecution, that during his surveillance he observed the defendant Madonna in the company of an "Italian male".* This reference to the ancestry of one of the defendant's companions inevitably drew further attention to Miss Portman's characterizations.

Further unnecessary references to the Portman characterizations were made by the prosecution during the cross-examinations of the defendant Klinger and his wife (R. 1609-1622).

The "atmosphere" created by the Portman characterizations and thereafter regenerated by the prosecution, we submit, influenced the verdict more than the relevant admissible evidence. See *Scott* v. *United States*, 263 F.2d 298 (5th Cir., 1959).

In short, it is the defendant's position that the prosecutor's use of this challenged evidence was an indulgence in prosecutorial, petti-foggery which should not be condoned by this Court.

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* In response to the defendant's motion to strike Agent Tale's testimony, the prosecution urged that the testimony was relevant inasmuch as it showed that the defendant already possessed a rented car on August 19. Therefore, when he rented the red Ford, it must have been for an illicit purpose. However, the prosecution had already proved that the defendant had a rental car prior to August 20 from the testimony of Lorrie Kurish, R. 772, et seq.

Finally, we assume that appellee will urge that inasmuch as the trial Court gave limiting instructions, any likely prejudice from the admission of the characterizations would be dissipated. There are several problems with this position.

First, even if the instruction was in all respects perfect, the best instruction would, under the circumstances, nevertheless be insufficient. As this Court has recently recalled: "the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be an unmitigated fiction. . . ." *United States* v. *Robinson*, *supra*, at fn. 12 quoting *Bruton* v. *United States*, 391 U.S. 123, 129 and *Kruelwitch* v. *United States*, 336 U.S. 440, 453.

Second, a limiting instruction is particularly likely to be ineffective when, as here, the evidence that is being limited it itself of a prejudicial nature. See *United States* v. *Robinson*, *supra*, quoting *Dolan Rule 403: The Prejudicial Rule In Evidence*, 49 So. Cal. L. Rev. 220 at 248-250; *United States* v. *Semensohn*, 421 F.2d 1206, 1208 (2d Cir. 1970).

Third, the limiting instructions given in the instant case were not directed at the prejudicial characterizations but merely instructed the jury that the total conversation between Portman and Klinger could only be considered against the defendant Klinger. This instruction, we submit, would require the jury to perform "mental gymnastics" in view of the fact that the colloquy between Portman and Klinger was contextually directed at the defendant Larca.

POINT II

The Court Erred In Excluding The Records Of The Albert Einstein Hospital Methadone Maintenance Clinic, Which Demonstrated That The Prosecution's Key Witness Gave Perjured Testimony As To A Material Fact.

a) Introduction

It will be recalled that Joseph Boriello, the linch-pin of the prosecution's case against the defendant Larca, testified that he first discovered his source for the heroin during a trip he took to Thailand in April 1976 (R. 104, 105, 109). It was this heroin, which became the fountainhead for the contraband involved in the criminal venture charged herein.*

In an effort to discredit this critically important testimony concerning the April trip, the defense subpoenaed the records maintained by the Methadone Clinic of the Albert Einstein Hospital (R. 1456).** Although the directors of the program were extremely hesitant to produce the records of Mr. Boriello, the Court intervened and the records were finally produced at the end of the defendants' cases. (A. 118, 119, 135, 137, 138).

They revealed that Bariello was present at the Methadone Clinic on April 15, 16, 19, 20, 21 and 26 of 1976

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* Significantly, the Government failed to produce any corroborating documents for this trip. Indeed Boriello maintained he had used a forged passport obtained from one "Smith" for the trip. Naturally, the travel document was destroyed prior to trial (R. 242-244, 255-256).

** Boriello was a patient at the clinic in 1976.

and that on May 12, 1976 he received a letter from the Clinic stating that inasmuch as he was making good progress, he was free to travel to Europe (A. 143-145). This evidence illustrated beyond any doubt that Boriello had lied about travelling to the Far East in April 1976. After a lengthy review of the documents, the Court agreed that they should be admitted in evidence (A. 145) and formally admitted them as defendant Larca's Exhibit V (A. 152-153, 313). Following the admission of the defendant Larca's Exhibit V, the prosecutor gave his closing argument. Immediately following that argument, the Court reported to all counsel that a number of individuals from the Einstein program had arrived at his chambers and wanted to speak with the Court with respect to Exhibit V (R. 1842). Thus, followed an off the record *ex parte conference between these individuals, the Court and D.E.A. agent Meale.* These individuals who were administrators of the methadone program, then informed Court and counsel that Larca's Exhibit V was not reliable, inasmuch as the entries were made essentially for billing rather than for the purpose of recording the accurate date of a patient's visit (A. 157-163).* Thereafter, over the defense's objection, the Court struck the Exhibit (A. 164-166). Following the jury's verdict, the Court received a letter from the Assistant to the Director and Counsel of the Methadone Maintenance Treatment Program which indicated that defendant Larca's Exhibit V was in fact reliable (A. 299-302). More specifically, the letter (CX 1) indicated:

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* Apparently the Methadone Program at Albert Einstein Hospital is funded and regulated by the Drug Enforcement Administration (A. 159). Moreover, it appears from the record that D.E.A. Agent Meale was the only individual able to secure the attendance of these administrators in Court. See Canon 3A(4), *Code of Judicial Conduct*, which clearly admonishes judges to avoid ex parte discussions of pending cases.

"... We, therefore, have searched for secondary sources which we now produce even though neither of the above documents speak directly to the issue of attendance during the time in question. However, in each case, the recorder is able to infer that the witness was probably present.

With regard to the Doctor's Order Sheet, the pharmacist who recorded the change in methadone dosage on May 2, 1976, pursuant to doctor's order of April 27, 1976, can state that, as a matter of Program pharmacy procedures, such an order and change does not occur without direct communication on the part of the patient and, therefore, *Mr. Boriello must have been present.*

With regard to the Record of Patient Contact, the counselor is prepared to state that, as a matter of regular Program Counseling procedure, entries are made indicating patient vacation or travel medication requests as well as instances of missed medication. *Mr. Boriello's record is silent as to these matters and, therefore, his counselor concludes that he must have been present.*" (sic) (Emphasis Supplied).

Despite the correction of the record on this critically important point, the Court declined to in any way disturb the verdict (2125-2131, 2134-2135). It is the defendant's position that the exclusion of the defendant Larca's Exhibit V clearly denied him a fair trial.

b) Argument

During its case, the defense sought to admit business records of the Einstein Hospital Methadone Maintenance program pursuant to Rule 803 (6) of the Federal Rules of Evidence. That Rule states:

> "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or date compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

After reviewing the records (DX V) the court concluded that the records were, in fact, admissible and thus, induced the prosecution to stipulate them into evidence (1747-48). Nevertheless, following an ex parte conference with the two individuals, and an Agent of the Government, the court which was apparently concerned more with expedience than with the defendant's right to a fair trial, *sua sponte* struck the exhibits without so much as one word of sworn testimony as to the lack of trustworthiness of the defendant's exhibit. The court ruled:

> "I'm not going to delay the trial. This is a matter that is not directly involved in this trial. You have other issues, it seems to me, that go to the credibility of this man. I'm not holding up the trial for that.
>
> "As far as my ruling on the matter is concerned, it is that the records are not reliable. It is on here. If I made an error, then, of course, if necessary, you know what to do with it." (A. 165-166).

Although we recognize that the question of "trustworthiness" is a crucial threshold issue of law going to admissibility and must in the first instance be resolved by the trial judge (*United States* v. *William Robinson*, — F.2d — (2d Cir., 1976, slip op. 333), such a determination must be a reasoned one based on more than unsworn ex parte communications. This is particularly so when it may be inferred that those ex parte communications may be the product of some "friendly persuasion." Inasmuch as it appeared from the face of the documents offered in evidence that they were kept in the regular course of business and that it was in the regular course of business to keep those records, the defendants prima facie demonstrated their "trustworthiness". See Advisory Committee notes to Rule 803(6), *McCormick on Evidence* 281, 286-287, and Laughlin "Business Entries and the Like", 46 Iowa Law Review 276 (1961). Moreover, there was no indication that the records sought to be introduced were "dripping with motivation to misrepresent," *Palmer* v. *Hoffman*, 129 F.2d 976 (2d Cir.) *affd.*, 318 U.S. 109, 63 S.Ct. 477 (1942) nor was there any personal interest by the preparer in the outcome of the litigation *Taylor* v. *Baltimore & Ohio RR. Co.*, 344 F.2d 281, 285 (2d Cir., 1965).

On the other hand the opponent of the admission of the documents offered no sworn evidence as to there lack of trustworthiness. If the court believed that there was some issue as to the reliability of the offered documents, he should have conducted a brief voir dire. Failure to do so deprived the defendant of an opportunity to destroy the semenal forces of the prosecution's case against him.* The exclusion of this highly relevant and probative evidence clearly affected the judgment and was therefore reversible error.

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* As was demonstrated by CX 1 on the defendant's post-trial motions, the documents here in issue were in fact reliable and trustworthy.

POINT III

The Appellant Was Denied A Fair Trial By The Cumulative Effect Of The Court's Rulings As To The Admission And Exclusion Of Proof And Restriction Of Cross-Examination.

a) Introduction

In the course of a sharply contested criminal prosecution, it is almost inevitable that certain errors occur. Both this Court and the Supreme Court have always acknowledged that fact and have held many errors harmless (Rule 52a of the Federal Rules of Criminal Procedure and Title 28 U.S.C. section 2111. See e.g. *Chapman* v. *California*, 386 U.S. 18; *Fahy* v. *Connecticut*, 375 U.S. 85). Nevertheless, courts of appellate jurisdiction cannot shrink from their obligation to uphold the rule of law simply because the record discloses ample evidence of the defendant's guilt when numerous errors have been committed *which in the totality of the circumstances*, *Fisk* v. *Alabama*, 352 U.S. 191, 197 (1956), substantially prejudice a defendant's right to a fair trial by cumulatively affecting the judgment. *United States* v. *Semansohn*, *supra* at p. 1210. See Traynor, *The Riddle of Harmless Error*, *supra*. We respectfully submit that a number of errors occurred in the Court below, the cumlative effect of which, requires that the judgment of conviction be reversed.* An analysis of these errors follows.

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* The problem of preserving the instant record for appellate review was made difficult because of the trial court's practice of refusing to allow the defense to make specific standing objections in violation of Rule 51 of the Federal Rules of Criminal Procedure. See *Butler* v. *United States*, 188 F.2d 24 (D.C. Cir., 1951) and *United States* v. *Walker*, 449 F.2d 1171, 1175 (D.C. Cir., 1971). The record is replete with examples of the Court's

[Footnote continued on following page]

b) The Court Below Unduly Restricted The Cross-Examination of Joseph Boriello, the Prosecution's Chief Witness

Over objection, the trial court relying on *United States* v. *Provoo*, *supra*, refused to permit defense counsel to cross-examine Joseph Boriello with respect to convictions for possession of a gun as a misdemeanor; misdemeanor possession of narcotics on two separate occasions and for conspiracy to obtain and use forged prescription blanks. (R. 202-209, 236-238; GX 3511G, 3511H; A. 296-298). We submit that the Court's refusal to allow use of these convictions to impeach Boriello's credibility was reversible error.

We are well aware of the fact that appellate courts give trial judges wide latitude in control of cross-examination but "[t]his principle cannot be expanded by justifying a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony." *Gordon* v. *United States*, 344 U.S. 414, 422-423 (1953); *Smith* v. *Illinois*, 390 U.S. 129 (1968). The Government's case against the defendant virtually turned on the trustworthiness of Boriello. Therefore, the defense should have been given wide latitude on cross-examination. Nevertheless, the Court below took an extremely narrow view and refused to allow impeachment through the use of prior criminal convictions despite

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failure to allow the defense to make specific objections. On the other hand the prosecutor was afforded every opportunity to make whatever objection he deemed appropriate. See for example, R. 262, 273, 365, 418-419, 889, 1255 and 1647 et sec. We submit that the Court's practice with respect to objections is but another example of a pattern of bias by the Court which effectively denied the defendant any fair trial.

the fact that those convictions involved dishonesty and in one instance facially false statements. See Rule 609 (a)(2) and 608(b).

Rule 609(a) of the Federal Rules of Evidence states where pertinent: "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime . . . (2) involved dishonesty or false statement, regardless of the punishment."

In the instant case, Boriello's convictions were inter alia, for forgery of prescription blank and possession of narcotics (A. 296). There is no question that forgery or forgery related offenses involve dishonesty (See Ladd, "*Credibility Tests, Current Trends*," 89 U. Pa. L. Rev. 166, 179-181 (1941); Weinstein's Evidence sec. 609(3) pp. 60-65. Similarly, several courts of appeal have held that possession of narcotics involves dishonesty. *United States* v. *McIntoch*, 426 F.2d 1231, 1233 (D.C. Cir., 1970); *Brooke* v. *United States*, 385 F.2d 279 (D.C. Cir., 1967) and *Evans* v. *United States*, 397 F.2d 675 (D.C. Cir., 1968). In cases where a witness has been convicted of possession of narcotics, the case for admission is even stronger, where as here, the witness has not only possessed drugs but is an addict whose reliability is of critical importance. *Perry* v. *United States*, 336 F.2d 748, 749 (D.C. Cir., 1964) and *Fletcher* v. *United States*, 158 F.2d 321 (D.C. Cir., 1946).

As the Court in *Perry* noted "[drug addicts] frequently are 'monstrous liars' ". 336 F.2d 748 fn. 2 citing Menninger, *The Human Mind* p. 148 (3rd Evid. 1949) and 2 Wigmore Evidence section 500 (3d ed. 1940). Further support for the defendant's position may be found in Rule 608(b) which provides inter alia that "specific instances of the conduct of a witness, for the

purpose of attacking . . . his credibility . . . may . . . in the discretion of the Court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning his character for truthfulness or untruthfulness . . ." See also, Ladd "Credibility Tests" *supra* at p. 180; 3 Wigmore Evidence sec. 982 at p. 550 (3rd ed. 1940) and Weinstein's Evidence sec. 608(5) all teaching that forgery and forgery related offenses fall within the scope of Rule 608(6).

c) The Court Below Erred In Excluding Testimony Offered Through The Defendant's Witnesses Ben Larca And Ralph Battista

But for the testimony of Boriello, the defendant's only connection to the alleged conspiracy was his presence at 58th Street and 5th Avenue at 5 p.m. on August 20, 1976. In its case, the defense sought to prove that the defendant's presence was merely to retrieve an automobile he had spontaneously loaned to Boriello earlier that day. Through Ben Larca and Ralph Battista, the defendant attempted to demonstrate that shortly after the defendant Larca had loaned the red Ford to Boriello, Larca was visited by an agitated and irritated Matthew Madonna, who in earshort of Ben Larca and Ralph Battista, shouted "how could you lend somebody I don't know my car". (A. 100-101, 112-113). Had the Court permitted the jury to hear the substance of this conversation, it would have been free to infer that the defendant believed the meeting on 5th Avenue and 58th Street was simply for the return of the car Boriello had borrowed and not as urged by the government for the transfer of narcotics.

Although this point has been briefed in detail by co-appellant, it would not be inappropriate to briefly sketch

the defendant Larca's position regarding the exclusion of this critically important testimony.*

First we urge that Madonna's statement should have been admitted not to establish the truth of the proposition contained therein, but simply to show that he made that statement. See Rule 801 of the Federal Rules of Evidence; *United States* v. *Carter*, 491 F.2d 625 (5th Cir., 1974); *United States* v. *Anost*, 356 F.2d 413 (7th Cir., 1966); and *United States* v. *Frank*, 494 F.2d 145 (2d Cir., 1974). The teaching of these cases are that statements made *to* a defendant, here Larca, by another, here Madonna, which would likely produce a state of mind in the defendant, (here that the car wrongfully loaned and should be retaken as soon as possible), are admissible. In other words, Larca's innocent state of mind (e.g. that the car wrongfully loaned should be recovered) might be deduced from the objective fact of an incident or statement of another. Even if not admissible as a verbal act, Madonna's statements are clearly admissible under the state of mind exception to the hearsay rule. Rule 803(3) of the Federal Rules of Evidence; *Mutual Life Ins. Co.* v. *Hillman* and *United States* v. *Stanchich*, — F.2d — (2d Cir. 1/6/77 slip op. 1277 at 1283-1285 Fn. 1). In *Stanchich* this Court most recently restated the now well-known *Hillmon* rule that the declaration of a state of mind is admissible not simply to show the state of mind, but is also allowable to prove a subsequent act. The fact that the declaration may be self-serving is not determinative. *United States* v. *Matot*, 146 F.2d 197 (2d Cir., 1944) and McCormick Evidence (2nd ed. p. 688).

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* That argument is expressly adopted by Larca pursuant to Rule 28i of the Federal Rules of Appellate Procedure.

d) The Court Below Erred In Allowing The Prosecution To Read Portions Of The Witness Boriello's Grand Jury Testimony In Evidence

In its case, the defense called Boriello's mother, Vera, and his half-brother, Ralph Battista, to testify that on September 30, 1976 following Boriello's incarceration at the Metropolitan Correctional Center, he told them he didn't care who he involved including his brothers and mother, so long as he protected himself and common-law wife. (R. 1342-1343, 1386-1388, 1464-1564). The defense was thus able to impeach Boriello's credibility and to develop a motive for testifying falsely.

In rebuttal, the Government, without recalling Boriello as a witness, introduced his grand jury testimony to demonstrate that prior to September 30, he in fact had obtained immunity for his brother and that therefore the testimony of his mother and brother were false. Over strenous objection by the defense, the Court permitted the prosecutor to read this patent hearsay into evidence (R. 1749-1751).*

It is the defendant's position that the Court committed reversible error in allowing rank hearsay in the form of Grand Jury testimony to be read to the jury without the production of the declarant who was available to the prosecutor.

The touchstone of any analysis regarding the denial of a defendant's right to confrontation is *Mattox* v. *United States*, 156 U.S. 237, 242-243, 15 S.Ct. 337,339

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* The defendants' objection was specifically couched in terms of their inability to cross-examine and denial of the right to confrontation (A. 140-142). No reason was given by the Government for their failure to produce the declarant nor did the Court request any reason.

(1895), where the Court held that the primary object of the confrontation clause of the 6th Amendment was to prevent depositions or *ex-parte* affidavits from being used against the defendant in lieu of the personal examination and cross-examination of the witness. The obvious rationale for the rule is not only to test the recollection and conscience of a witness but to compel him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony. In short, is he worthy of belief. Here the prosecutor's use of Boriello's ex-parte Grand Jury testimony deprived the defendant of those rights. See *Pointer* v. *Texas*, 380 U.S. 400, 85 Sup. Ct. 1065, 1068-1070; *Barber* v. *Page*, 390 U.S. 719, 88 Sup. Ct. 1318, 1320-1321; and *United States* v. *Fiore*, 443 F.2d 112 (2d Cir. 1971).

In *Pointer*, the prosecutor introduced in evidence transcripts of the defendant's preliminary hearing which did not subject the declarant to cross-examination. Following the Court's decision to apply the confrontation clause of the 6th Amendment to the States through the 14th Amendment, the Court held:

> "Because the transcript of Phillips' statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine Phillips, its introduction in a federal court in a criminal case against Pointer would have amounted to denial of the privilege of confrontation guaranteed by the Sixth Amendment. Since we hold that the right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceeding, it follows that use of the transcript to convict petitioner denied him a constitutional right, and that his conviction must be reversed."

Similarly, in *Barber* v. *Page*, *supra*, the prosecution sought to introduce the testimony of a co-defendant given at a preliminary hearing, which testimony was not subject to cross-examination. The Supreme Court held that where a declarant is available, it was a violation of the defendant's constitutional right of confrontation and right to cross-examine to use a transcript of the declarant's testimony at the defendant's preliminary hearing. The Court therefore reversed the conviction. Mr. Justice Marshall speaking for a unanimous Court held that to allow the use of the transcript of a preliminary hearing during the course of a trial was reversible error, particularly when the declarant is available to the prosecutor. See also *Douglas* v. *Alabama*, 380 U.S. 415; *Brookhart* v. *Janis*, 384 U.S. 1; *California* v. *Green*, 399 U.S. 149, 161-162.

This is not a case where the declarant was subject to cross-examination on the issue sought to be introduced. (See *California* v. *Green*, *supra*.) Nor is it a case where the declarant is unavailable either in fact or because of his refusal to testify.

In *United States* v. *Fiore*, *supra*, a witness for the prosecution apparently had a change of heart after testifying before the Grand Jury. When called to testify during the prosecution's case-in-chief, he refused to even take the oath. "There followed a protracted *pas de deux* with the prosecutor reading portions" of the declarant's "Grand Jury testimony framed by the questions." Thereafter, the Government, without the presence of the declarant introduced his Grand Jury testimony. In reversing the Judgment of Conviction, Judge Friendly speaking for a unanimous Court held:

> "Under the circumstances, the admission of his (the declarant's) Grand Jury testimony would appear to offend not only the hearsay rule, even in

> the liberalized form adopted by this circuit, but the confrontation clause of the Sixth Amendment, as well." 443 F.2d at 115 (Citations omitted.)

In view of the teaching of *Pointer*, *Barber* and *Fiore*, it is crystal clear that the Court below committed grave error in allowing the prosecutor to read the bare Grand Jury testimony without requiring the production of Boriello for cross-examination.*

Had the defense been permitted to further cross-examine Boriello with respect to his September 24 Grand Jury testimony, it may well have buttressed its position that he had a strong motive to lie to the Grand jury. This situation is analogous to the sort of case where a prosecutor introduces new material on re-direct examination and the Court precludes re-cross-examination. See *Philips* v. *Neil*, 452 F.2d 337, 345-348.**

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* *United States* v. *DeSisto*, 329 F.2d 929, 933 (2d Cir., 1964) and its progeny including *United States* v. *Mingoia*, 424 F.2d 710 (2d Cir., 1970) and *United States* v. *Insana*, 423 F.2d 1165, 1169-1170, are not here applicable for those cases suggest that Grand Jury testimony may be admissible for the jury's consideration as affirmative evidence only where a calcitrant witness denies his prior statements; where his testimony at trial is inconsistent with his prior statements; or where the prosecutor claims surprise. Nor is this the sort of case which is controlled by Rule 801 of the Federal Rules of Evidence. Under Rule 801 the declarant must be *"subject to cross-examination concerning the statement"* sought to be admitted. See *Smith* v. *Illinois*, *supra*.

** This case is unlike *Dutton* v. *Evans*, 400 U.S. 74, 88 (1970) where as noted by Justice Marshall in *Anderson* v. *United States*, 417 U.S. 211; 94 Sup. Ct. 2252, 2260—"(the) evidence is not hearsay when it is used only to prove that a prior statement was made and not to prove the truth of the statement." 94 Sup. Ct. 2260, fn. 8. Moreover, in *Dutton*, it appeared that the declarant was unavailable, whereas in the instant case, the declarant was readily available to the prosecutor. The fact that the defense could have called Boriello is of no import in these circumstances. See *Hoover* v. *Beto*, 439 F.2d 913 at 924.

In short, we submit that the Court's conduct violated the defendant's right to cross-examination and confrontation of the defendant's accuser in violation of the 6th Amendment of the United States Constitution.

POINT IV

The Court Below Erred In Allowing The Prosecution Over Objection To Introduce Evidence Of Prior Crimes Purportedly Commited By The Defendant, Which Acts Pre-dated the Conspiracy Alleged In The Indictment By Over Four Years.

a) The Alleged Prior Crimes

Nicholas Visceglie, a multiple felony offender, testified that in early January 1972, he met the defendant Madonna at a bar in the Bronx (1072-1078).* According to Visceglie, during the course of the conversation, Madonna agreed to supply him with 10 kilos of heroin (1079).

Visceglie then narrated a story of attempts to raise the money for the purchase of the drugs; several meetings with the defendant Larca in which Larca was informed that the money was not yet raised; and finally the withdrawal of the alleged sale by the defendant Madonna (1080-1092). There was no corroboration or attempt to corroborate Visceglie's testimony which the prosecution offered on the issue of intent. This, despite the fact that the defendant Larca raised no issue as to intent. See *United States* v. *DeCicco*, 435 F.2d 478 (2d Cir. 1970).

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* Visceglie's convictions included robbery, criminal sale of narcotics and conspiracy to possess with intent to distribute narcotics (R. 1072-1075).

b) The Applicable Law

It is inconsistent with the fundamental principles of due process to permit the introduction of any evidence of prior crimes which might induce a jury to convict a defendant for mere criminal propensity rather than for his guilt of the offense charged. *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir., 1975); *United States* v. *Chrzanowski*, 502 F.2d 573 (3d Cir., 1940); *United States* v. *Stirone*, 262 F.2d 571, 576 (3d Cir., 1960), *rev. on other grounds*, 361 U.S. 212 (1960); *Boyd* v. *United States*, 142 U.S. 450 (1892) and Rule 404(b) of the Federal Rules of Evidence.

This concept is particularly poignant in a conspiracy case where, as here, as a result of the admission of the prior bad acts, the defendant Larca was confronted with a hodge-podge of acts and statements, (e.g. those made by Visceglie and others) which he obviously never authorized, intended or knew about but which helped persuade the jury of the existence of a conspiracy itself. *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1948). By this mass of remote, irrelevant and inflammatory prior crimes evidence, the jury was overwhelmed with the stench of crime and distracted from the issues in the case.

None of the well-known exceptions to prior crimes evidence was applicable to Visceglie's narrative. They did not, for example, tend to prove a larger scheme or plan of which the present charge was a part, as in *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir., 1975), nor did they tend to prove motive or identity. See generally, McCormick, Evidence 449 (2d ed. 1972), as to show the background and development of the conspiracy. Cf. *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir., 1975).

Although the prosecution rationalized the admission as probative of intent, there could be no legitimate basis to infer intent from the alleged bad acts inasmuch as they took place more than four years prior to the alleged conspiracy. *United States* v. *Decicco*, 435 F.2d 478 (2d Cir., 1970).

In truth and in fact, the only common thread between the crimes testified to and those on trial is that they involved narcotics. But proving prior narcotics crimes by the defendants is the grossest form of character evidence, *United States* v. *Pucco*, 435 F.2d 539, 542 fn. 9 (2d Cir. 1971). It would be unthinkable to permit a witness in a murder case to testify that he and the accused committed a murder ten or fifteen years ago. Yet, there, as here, one could conjure up claims about relevancy. Nor can the theory that the prior crimes evidence supports the credibility of the witness be employed to justify confusion and prejudice. See *United States* v. *Falley*, 489 F.2d 33, 37 (2d Cir., 1973).

These crimes were not and could not have been charged in the indictment. Yet had they been charged, at least the defendants would have had an opportunity to meet them. Cf. *United States* v. *Falley*, *supra*.

The Visceglie testimony relating to an attempted narcotics transaction which took place more than four years prior to the conspiracy charged, showed mere criminal propensity; were not logically connected to the offense charged and were far too remote to arguably be part of a common scheme or plan of criminal action.*

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* The Government did not here urge their usual argument that the bad acts were logically connected because they showed a general relationship between narcotics dealers in one large plot to possess and distribute narcotics is wholly invalid. See *United States* v. *Bertolotti*, 529 F.2d 149 (2d Cir. 1975) and *Kotteakos* v. *United States*, 328 U.S. 750.

If believed, Visceglie's testimony showed only a loose pattern of criminal behavior with respect to the general subject of narcotics more than four years prior to the events that occurred in the instant case. No nexus was established between that behavior and the scheme alleged in the instant indictment. Moreover, the evidence did not, in fact, establish motive, intent or even modus operandi. Instead, it painted the defendant as an immoral, unscrupulous individual with criminal propensities. See generally, Weinsteins Evidence, section 404 (08), 404(09). The bad acts evidence was thus not relevant and should have been excluded.

United States v. *Magnano*, 543 F.2d 431, 435 (2d Cir., 1976) is not to the contrary. In *Magnano*, the prior acts evidence was justified as having been necessary for the specific purpose of demonstrating how one who had been incarcerated was able so quickly after his release to become a member of a conspiracy. This demonstrated "the background and development of the conspiracy", obviously by dissipating what would otherwise have been an improbability with respect to the association. Here the Madonna-Larca association was not contested and thus the Magnano rational is inapposite.*

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* A sampling of many cases decided in the Second Circuit illustrates that the time gap between the prior similar act and the crime for which the defendant is charged is much closer in those cases than exists in the instant case. See *United States* v. *Johnson*, 382 F.2d 280 (2d Cir., 1967); *United States* v. *Kaplan*, 416 F.2d 103 (2d Cir., 1969); *United States* v. *Braverman*, 376 F.2d 249 (2d Cir., 1967); *United States* v. *Deaton*, 381 F.2d 114 (2d Cir., 1967); *United States* v. *Robbins*, 340 F.2d 684 (2d Cir., 1965); *United States* v. *Bretholtz*, 485 F.2d 483; *United States* v. *Byrd*, 352 F.2d 570 (2d Cir., 1965); *United States* v. *Decicco*, 435 F.2d 478 (2d Cir., 1970); *United States* v. *Tramunti*, 513 F.2d 1087 (2d Cir., 1975); *United States* v. *Bradwell*, 388 F.2d 619 (2d Cir., 1968); *United States* v. *Bozza*, 365 F.2d 206 (2d Cir., 1966); *United States* v. *Gardin*, 382 F.2d 601 (2d Cir., 1967).

Assuming arguendo that prior uncharged criminal behavior of the defendants did have some relevance in proving something other than criminal propensity, that evidence, on balance, should have been excluded because its probative value was substantially outweighed by the danger of unfair prejudice; it confused the issues; misled the jury; and was nonessential to the prosecution's case. *United States* v. *Byrd*, 352 F.2d 570 (2d Cir., 1965); *Stirone* v. *United States*, *supra* and Rule 403a of the Federal Rules of Evidence. In short, even if relevant, that relevancy was "entirely obscured by the dirty linen hung on it". *State* v. *Gobel*, 218 F.2d 300, 306 (Wash.) and Rule 403 of the Federal Rules of Evidence.

The problem is not merely one of pigeon-holing or determining whether the evidence offered fits into a category of an exception to the rules, but rather one of balancing the actual need for the other crimes evidence in light of the issues and the other evidence available to the prosecution. *United States* v. *Bozza*, 365 F.2d 206, 213 (2d Cir. 1966); *United States* v. *Brettholz*, 485 F.2d 483, 487 (2d Cir., 1973); *United States* v. *Phillips*, 401 F.2d 301, 305-306 (7th Cir., 1968). It is clear that the probative value of the criminal behavior of Visceglie with the defendants in early 1972 was far outweighed by the undue prejudice toward the defendant Larca. The Court below therefore abused its discretion in admitting such evidence. *United States* v. *Weiler*, 385 F.2d 63 (3rd Cir., 1967); *McHale* v. *United States*, 398 F.2d 757 (D.C. Cir., 1968), *cert. denied*, 393 U.S. 985 (1968). Cf. *United States* v. *Natale*, 526 F.2d 1160, 1173 (2d Cir., 1975).

Finally, the court's charge on prior crimes could not have cured the prejudice. That "prejudicial effects can be overcome by instructions to the jury . . . all practicing

lawyers know to be unmitigated fiction." *Krulewitch* v. *United States*, 336 U.S. 440, 453 (Jackson, *J.* concurring). See also *Bruton* v. *United States*, 391 U.S. 123 (1968); *United States* v. *Falley*, *supra*, at 38.

POINT V

The Appellant, Salvatore Larca, Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure Respectfully Adopts All Points Advanced By His Co-Appellant Insofar As Those Points Are Applicable To Him.

CONCLUSION

It is respectfully submitted that the Judgment appealed from should be reversed and the Indictment dismissed.

Respectfully submitted,

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